United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7147

To be argued by
BERNARD BURSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIE BAKER,

Plaintiff-Appellee,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant,

and

ROBERT E. BLISS, STUART V.SCHILLER, LEE R. JOHNSON,

Defendants,

On Appeal from a Judgment of the United States District Court for the Southern District of New York,

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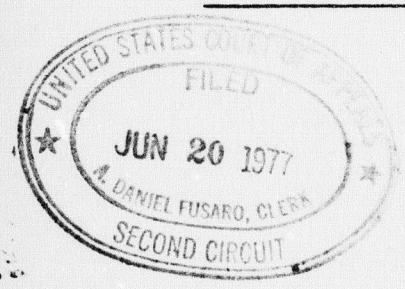
APPELLANT'S BRIEF



W. BERNARD RICHLAND
Corporation Counsel of
The City of New York,
Attorney for Defendant-Appellant
Municipal Building,
New York, N.Y. 10007,
566-4337 or 566-4331

L. KEVIN SHERIDAN,
BERNARD BURSTEIN,
JAMES M. CARROLL,
of Counsel

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LEE R. JOHNSON,

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On Appeal from a Judgment of the United States District Court fnr the Southern District of New York

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is a personal injury action brought in the U.S. District Court, Southern District of New York (BONSAL, J.) (74 Civ. 4693), based on a claim of negligence, arising out of an automobile accident in the City of New York. The jurisdiction of the federal court is based on diversity of citizenship. The accident occurred when a Ford Thunderbird, owned by defendant Schiller, but stolen from him, while evading the police, passed a red light at tremendous speed, and struck a limousine, owned and operated by defendant Bliss

(1, 3, 4,)* Among the 10 passengers in the limousine was the plaintiff here, Julie Baker. (Other actions arising out of this accident were brought in the New York state courts). Julie Baker's brother, Steven Baker, also in the car, was originally a plaintiff in this action but his claim was discontinued, during trial, with prejudice, as was also the derivative claim of their father Louis Baker. Also discontinued at trial was the claim against defendant Schiller, the owner of the Thunderbird, after undisputed evidence that the car had been was stolen from him (94).* Lee E. Johnson, also named as a defendant, was (admittedly) found in the Thunderbird after the accident, but, after a criminal trial on the charges of auto theft and vehicular homicide, he was acquitted, his defense being that he was a sleeping passenger and that the driver had fled after the accident (40). The claim against him was evidently abandoned. A claim against the Waldorf Astoria (from where Bliss' limousine had started) was dismissed earlier, with judgment entered May 24, 1976.

The claim was submitted to the jury against defendant Bliss, the owner-driver of the limousine, and the City of New York, although plaintiff's counsel, in

*Numbers in parentheses, unless otherwise indicated, refer to pages in the Appendix, which numbers appear above the transcript page numbers.

**The title of the action used on this brief is as appears on the judgment of the United States District Court for the Southern District of New York, as entered in that court on March 3, 1977.

his summation, conceded he could see no negligence on the part of Bliss (183, 184). The claim against the City was that the police were negligent in (a) undertaking to pursue the Thunderbird, and (b) did so in a negligent manner, namely, at great speed and without using the siren.

The jury returned a verdict solely against the City of New York, in the amount of $175,000 (212-213, 208-209). From the judgment of the United States District Court, Southern District of New York, (BONSAL, J), entered March 3, 1977, the City appeals (44a-45a).

ISSUES PRESENTED

Appellant's argument for dismissal (Point I) raises the following issue:

1. Where the police were preparing to issue a traffic summons to a driver who had just passed a red traffic light, when the violator, who had stopped, suddenly took off at great speed and, within a few seconds, collided with plaintiff's vehicle (1) was the act of the police in attempting to issue a summons a basis for imposing liability and (2) was the reaction of the police in the brief interval between the stop and the accident, in pursuing the lawbreaker, a proximate cause of the collision only second later?

Additionally, if the evidence does not warrant a dismissal, the appellant argues (in Point II) for a new trial on the basis of prejudicial error in the charge. One of the arguments advanced by plaintiff, and stressed in summation, was that since the police were unaware that the car had been stolen, and because the police vehicle

was incapable of overtaking the Thurderbird, the police were negligent in having undertaken to pursue, and by doing so, caused the lawbreaker to drive more recklessly. In light of such argument, the City requested the follow ing charge on New York law (No. 3 on the written request) taken verbatim from Thain v. City of New York, 35 AD 2d 545 (2d Dept., 1970) affd. 30 NY 2d 524 (1974), to wit (16a-17a):

> "A municipality is not to be held liable for the acts of its police officers in undertaking a pursuit of a traffic violator. The police have a duty to undertake pursuit. If the officers conduct the pursuit using their best judgment as to the effective means of dealing with the violator, no liability will attach to their acts, even though hind-sight might disclose alternate methods that might have been safer for the public bystanders." (emphasis ours)

The Court declined such a request, and a specific exception was taken (210). The Court, after prohibiting defendant's counsel from arguing along these lines in summation (181-182), described plaintiff's claim as being that the police acted "unreasonably", and instructed the jury to measure defendant's conduct "against those standards that you believe would have been reasonable" (199). The issue raised by the argument for a new trial is:

> 2. Did the trial court commit prejudicial error in declining to charge the jury that the police had a duty to pursue a traffic violator, and that no liability was to attach to such acts

even though "hindsight might disclose alternate methods that might have been safer for the public bystanders"?

FACTS

A. Undisputed facts

According to the testimony of the two police officers, Officers Francis Gallagher and David Jaques, which is not disputed, they were on duty in a marked police emergency vehicle (a fully-equipped Plymouth station wagon) travelling north on First Avenue, in Manhattan, when, just after midnight (December 23, 1973), they observed a Ford Thunderbird turn north onto First Avenue from 82nd Street, passing a red traffic light (45-47). (The owner of the Thunderbird, Schiller, testified that he had parked his car on 82nd Street, between First and Second Avenues [15-16]). The violator was travelling at lawful speed, and police followed also at lawful speed, with the overhead light flashing, but no siren. The Thunderbird proceeded on 83rd Street until it stopped about 50 feet from the corner of Lexington, behind some vehicles stopped for a red light (166-170).

The police car, with Gallagher driving, pulled up about 10 feet behind the Thunderbird. Officer Jacques got out, walked over to the right side of the Thunderbird in front of the driver so as to be visible, and motioned to the driver to turn off his engine (58). When the

traffic light at 183rd Street turned green, the cars stopped in front of the Thunderbird proceeded forward, at which time the Thunderbird suddenly shot forward, requiring Officer Jacques to jump aside onto a parked car to avoid being hit (59-60, 137). At the corner (at Lexington), the Thunderbird turned left (south) at great speed and, after passing two red lights, struck a Cadillac limousine travelling east on 80th Street. Considering the distance travelled (three short blocks) and estimated speed of the Thunderbird (between 60 to 70 m.p.h.,) the accident must have occurred only seconds after the incident at 83rd Street.*

Some time before, a group of ten persons had left the Waldorf Astoria (at 50th Street and Park Avenue) where they had celebrated the engagements of Joseph Gregorio to Cheryll Ohman and of his brother, Fred Gregorio, to Julie Baker, the instant plaintiff. With these four were Mrs. Rose Gregorio, the boys' mother, also plaintiff's brother, Steven Baker, also her sister and brother-in-law, Diane and Howard Camac, and two friends, Donna Amarino and Vincent LaGana. Outside the Waldorf, the ten got into a limousine owned and operated by defendant Bliss. The four girls, Julie, Donna, Cheryll and Diane were in the back seat;

*It is a matter of mathematical calculation that a vehicle going 60 m.p.h., and therefore 1 mile (5280 feet) per minute, is going 88 feet per second.

four men, Joe, Fred, Vincent and Steven were in the middle, on fold-down seats, and in the front seat, alongside Bliss was Mrs. Gregorio and to her right was Howard Camac (1-2, 18-19).

From the Waldorf the limousine proceeded north on Park Avenue to 80th Street, where Bliss turned right, then proceeded east toward Lexington Avenue.

A. The plaintiff's case

Defendant Bliss, called by plaintiff, testified that at the intersection of 80th and Lexington, there was a "blind" corner to his left and he could not see any traffic on Lexington until he was already a couple of feet into the intersection, and then, suddenly, from his left, he saw a car almost on top of him, as far away as the witness was from the judge (5, 6-8). Behind that car [it was the stolen Thunderbird] he saw a vehicle with a flashing red ball, maybe a block or a block and a half back. (9-10). He heard no siren, but added almost immediately that the windows of his car were "up," it being a cold night (4,10).

Rose Gregorio, sitting next to Mr. Bliss, and looking ahead, observed nothing at all and heard nothing (12,13). "All I can remember," she said, "is we were just talking and laughing and that was it" (12).

Vincent LaGana had no recollection of anything after leaving the Waldorf Astria (14), not did Cheryll

after leaving the Waldorf Astria (14), nor did Cheryll Ohman (35-36) nor Julie Baker (91-92, 93). The hospital record shows that Julie Baker "does not recall several minutes before and after accident" (42).

Donna Amarino confirmed that it was cold and the windows were "all shut" (21). She was "not focusing on the traffic," and prior to impact she too didn't see or hear anything (20,22), which, essentially, is the testimony also of Diane Camac (26-27), except that Diane testified it was "relatively" quiet in the car (26). The window was closed where she was (26).

Howard Camac, sitting to the right of Mrs. Gregorio, heard no siren and to his right the window was very slightly open (23-24). He did not see the car that struck the limousine (25). (These other passengers, all injured in the accident, are plaintiffs in lawsuits pending in the state courts arising out of this accident).

William Russell, a police officer who investigated the accident, connection with his duties, called by plaintiff, testified to having obtained a statement from Steven Baker that Baker did not see the other vehicle and did not "remember" any signal (30-33). Another witness interviewed by Russell, one Steven Gross, gave a statement that he heard the "screech of tires" and saw the red lights on the roof of the police car, but Gross' statement does not indicate <u>whether or not</u> he heard a siren (34).

Plaintiff's counsel read from testimony by Lee Johnson, at a Department of Motor Vehicle hearing (on March 25, 1976) that he was in the Thunderbird but intoxicated and asleep until awakened by the accident (37-38). He testified he had met a "guy by the name of T. J. . . . at a party [who] was giving me a ride home" (38). Johnson was identified by both Gallagher and Jaques as the driver of the Thunderbird, was tried on a charge of vehicular homicide, but was acquitted (40-41)*

Officer Francis Gallagher, the driver of the police car, a 16-year veteran on the force, called by plaintiff, testified that he continuously sounded the siren, a constant blast, for the whole of the time they were on Lexington Avenue (87, 53, 79). The Thunderbird, he said, was travelling 70 to 75 miles per hour, and their vehicle at about 50 to 55 mph, with the Thunderbird pulling away (64, 66, 67, 81-82). Gallagher hoped that the Thunderbird would soon slow down in traffic, although up to 80th Street there was a "clear track" ahead (67, 68). At one point, Gallagher estimated that the Thunderbird was about 75 to 80 feet ahead of the police vehicle at the time of the collision, but elsewhere he testified that

*This acquittal was apparently based on the testimony of a bystander, one Michael Ferder, that after the accident, as the police were tending to the people trapped in the Cadillac limousine, another man, a white man (Johnson was colored), left the Thunderbird and fled on foot. Mr. Ferder was also a witness in the instant case.

the police were only just passing 81st Street when the impact occurred at 80th Street (84-85).*

David Fallek, formerly an inspector the police department and now retired (96), called by plaintiff, testified concerning the "policy" of the department as to when a chase should be undertaken, which, said he, involves "consideration" of the crime that the officer thought was being committed, the ability of the police vehicle to overtake the pursued vehicle, and the traffic conditions in the area (97-98), but "normally we take off after him under normal conditions" (100, 110).

In Fallek's opinion, when the Thunderbird stopped, the proper procedure would have been for the police to stop their vehicle in front of the Thunderbird so as to "block off the offending car," and not, as Officer Jaques did here, place himself in a vulnerable position (102-103, 99). He agreed that police have a duty to undertake pursuit "generally", but could not say, yes or no, whether that was the "rule" (110). "They would have a duty", Fallek

*This discrepancy is not unusual if we recall that the police car, if going 55 miles per hour, was going about 80 feet in one second. More reliable than estimates of speed and time is the physical observation of the two officers and of a bystander in the street that the police car stopped at the edge of 80th Street, without entering the intersection more than a couple of feet (65, 86, 169, 170), which would seem to put the police car further back of the thief than 80 feet or else establish its speed as considerably less than 55 m.p.h.

said, "to follow him discretely without alarming this particlar motorist into doing anything foolishly" (110). By "discretely," Fallek meant, without sounding the siren, which said he, would be "like waving a red flag in front of a bull" (106-107).

Officer Kenneth Jaques, Gallagher's partner, and like Gallagher a 16-year veteran on the force, called by plaintiff, testified that the overhead red light was flashing, and the siren was sounding as they were proceeding south on Lexington (118, 129, 114). The reason they pursued the Thunderbird from 83rd Street was because of the driver's attempt to run Officer Jaques down (120). Jaques was asked the practice or instructions of the Department as to when pursuit should be undertaken, and answered that it was a matter of "just common sense", and that they would not have been continued if anybody was in danger (124). There were vehicles on Lexington Avenue but these, about three in number, pulled over to give the police the right of way (130, 135). Jaques estimated they were about a half block behind when the Thunderbird reached the intersection of 80th Street, with both vehicles then travelling at about 60 m.p.h. (139-140, 142). The chase lasted less than a minute, and had it gone longer, Jaques said, "we probably would have given up" (127).

Matthew J. Neary, a retired veteran of 26 years on the force, and at the time of trial a professor of police

science at John Jay College (146), testified, for plaintiff, that the police undertaking a high speed chase should consider the severity of the offense committed or suspected, the presence of other vehicles and pedestrians in the area, and that "if at anytime the safety of the officer or any other persons in the vicinity was endagered to the extent that any of them might be severely injured, the chase should be terminated" (147-148, 152). He agreed that the police were confronted with the need for "an immediate decision" (151), but, on the facts testified to by Jaques, it was Neary's opinion "that the officer should have given serious consideration to discontinuing the chase" (153).*

The Court "deemed" that motions to dismiss the complaint to have been made, and denied them (154-155).

The City's case

Michael Ferder, at the time of the trial a research assistant at the Harvard University Medical School and living in Boston, (158-159), had, at the time of this accident, been living in New York City (160). That day, just after midnight, he parked his automobile on 82nd Street, between Lexington and Third Avenue, and was walking with a girl companion toward Lexington Avenue, to a restaurant when, suddenly, his attention was aroused by a "loud siren" (161-163).

*The witness was paid $250 for his time in court, plus $200 for five hours of research (149-150).

From the corner of 82nd and Lexington he saw a white car, a Thunderbird, speeding down Lexington, at about 70 m.p.h. (161, 165, 175, 176). The police vehicle was maybe a half a block or maybe a block behind (165-166). He saw the accident from 82nd Street, and volunteered his information, first to the Daily News, and was referred by them to the police (166-167, 177, 178).*

Motions for a directed verdict were denied (180).

Summation of plaintiff's Counsel (185-187, 187)

The tenor of the arguments made by plaintiff's counsel can be seen from this passage of his summation:

> "And the police have rules for this situation, ladies and gentlemen, and yet the No. 1 rule to be considered: can the police car overtake the Ford Thunderbird? And what did Officer Gallagher say on the stand? We would never have caught him on staight speed. To that effect.
>
> And the second question, and this is the key, to Officer Jaques this morning: 'Officer, what was the danger to the community or to anybody if this man was not immediately apprehended?' and, ladies and gentlemen, his answer was '"None"'. There was no danger to anybody.

*The witness Ferder did not corroborate every aspect of the police officers' testimony. He insisted (and so testified at the criminal trial of Lee E. Johnson) that while the police ran to the Cadillac, now smashed up against a church, to relieve the passengers, a white man left the Thunderbird from the driver's side and ran away (171-174). The police maintained the driver was a black man, specifically that it was Mr. Johnson. The jury at the criminal trial obviously had a reasonable doubt. It was this discrepancy that caused him to present his information to the Daily News, and to the police (177-178).

> And the result is that woman [Mr. Gregorio] does not have her two sons and everybody else here spent months in the hospital and there was no danger, and Mr. Carroll [the City's counsel] talks about a stolen car, but they didn't know it was stolen? It's a stolen car. It's $3000. The police recognized this. Where are your priorities as to what happened?
>
> * * *
>
> For your consideration, according to that police pamphlet dated 1972. Vehicle capability. Can the station wagon overtake the Thunderbird? That is No. 1. Cars in the area. Are there cars in the area? [No.2] You heard Gallagher and Jaques both say there were cars stopped at 83rd and Lexington to get out of the way of the police car, there were cars on Lexington pulling over to get out of the way. There was traffic.
>
> No. 3, the violation. It was a red light. It was a red light. That is the botton line here.
>
> And No. 4, the danger to the community and even Officer Jaques told you 'absolutely none'. No danger to the community in any way, shape or form, except as a result of this high speed chase. And if they wanted him for that red light, and if they wanted him for trying to run down the police officer, they had that license number. They told you that at the or outset."

The charge to the jury (188-209)

The Court charged that plaintiff's theory of liability was that the police failed to use "reasonable or ordinary care;" and the summed up (459-460):

> "So the ultimate question which you the jury must resolve here is what was reasonable under the circumstances as to which you have heard testimony.
>
> And here you recognize that one set of

> circumstances might demand slight care and yet be reasonable. Another might demand the highest possible degree of care and foresight in order to be termed reasonable. And in determining what would have been reasonable care under the circumstances of this case, ladies and gentlemen, please draw on your general knowledge and experience and measure the defendant's conduct against those standards that you believe would have been reasonable."

The Court had declined defendant's request (No. 3) to charge, in the language of Thain v. City of New York 35 AD 2d 545 (2d Dept., 1970) affd. 30 NY 2d 524 (1972), that "the police have a duty to undertake the pursuit" of traffic violators and that the City could not be held liable merely for doing so or liable merely if "hindsight might disclose alternate methods that might have been safer for the public bystanders" (210, 16a-17a).

POINT I

UNDER NEW YORK LAW, THE POLICE HAD A DUTY TO ISSUE A SUMMONS TO A TRAFFIC VIOLATOR, AND ATTEMPTED TO DO SO HERE, AFTER THE VIOLATOR STOPPED. THE VIOLATOR, TO AVOID BEING DISCOVERED TO BE A CAR THIEF, SUDDENLY AND UNEXPECTEDLY SPED AWAY AND STRUCK PLAINTIFF'S CAR ONLY SECONDS LATER. WHAT THE POLICE HAD DONE PRIOR TO THE TIME THE VIOLATOR SPED AWAY WAS ENTIRELY PROPER AND WAS THEIR DUTY. WHAT THE POLICE DID IN THOSE SECONDS AFTER THE THIEF SPED AWAY AND BEFORE THE ACCIDENT HAD NO EFFECT ON THE THIEF'S DESPERATE ACTIONS DURING THAT BRIEF INTERVAL. NOR CAN LIABILITY BE PREDICATED UPON ANY ALLEGED FAILURE OF THE POLICE TO SOUND THEIR SIREN, IT BEING PLAINTIFF'S EVIDENCE AT TRIAL THAT SOUNDING THE SIREN WAS NOT THE SAFEST ALTERNATIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

There is no disagreement that this case is to be decided under the law of New York. In Thain v. City of New York, 35 AD 2d 545 (2d Dept., 1970) affd. 30 NY 2d 524 (1972), a case where liability was imposed, the court was nevertheless clear in reiterating, as a principle of law, that "a municipality is not liable for the acts of its police officers in undertaking the pursuit of a traffic violator" because police have a "duty" to do so, and that no liability may attach "even though hindsight might disclose alternative methods [of pursuit] that might have been safer for the public bystanders," citing for this proposition, Stanton v. State of New York 29 AD 2d 612 (3d Dept., 1967) affd. 26 NY 2d 990 (1970). In

Stanton the court specifically rejected an attempt to predicate liability on a proposition advanced by claimant, that the a police officer, in "attempting to halt one increasing the danger on the highway, did by his attempt alone increase the danger himself." To accept such a "novel" proposition, said the court, would mean that the police would be rendered ineffectual and would have to ignore lawbreakers, diminishing thereby the protection of the public (29 AD 2d at p. 614). The same would be true if police were bound to break off pursuit as soon as a lawbreaker exceeded the speed limit. See, Strobel v. State of New York, 36 AD 2d a485, 487 (3d Dept., 1971).*

The law, as stated above, is essentially the same throughout the country. See, e.g., United States v. Hutchins, 268 F. 2d 69 (6th Cir., 1959); State of West Virginia v. Fidelity and Cas. Co. of N.Y., 263 F. Supp. 88, 90-91 (S.D. West Va., 1967); Chambers v. Ideal Pure Milk Co., 245 SE 2d 589, 590 (Ky, 1952); Roll v. Timberman, 94 N.J. Super 530; 229 A 2d 281, 284 (N.J., 1967); Wilson v. City of Tuscon, 8 Ariz. App. 398; 446 P 2d 504, 509-510 (Ariz., 1968); Bailey v. L.W. Edison, 28 N.E. 2d 141, 146 (Ind., 1977).

*It is no answer to say that all the police needed here was to know the violator's license plate number. This would reveal only the registered owner, which indicates why a registered owner does not usually flee, and why, in most cases of desperate flight, the lawbreaker is likely to be more than merely a traffic violator.

Even if there were no such duty, the police are certainly not under any contrary duty, and are at least justified in pursuing a traffic violator. Pagels v. City and County of San Francisco, 135 Cal. App. 2d 152; 286 P 2d 877, 878 (Calif , 1955).

Those cases where liability has been imposed on a City for an injury caused by a fleeing criminal are not inconsistent with the above principles. Those cases all involved situations where the police, by an extended chase, spurred the lawbreaker to greater recklessness, and conducted that chase in a negligent manner, or where, additionally, as in Myers v. Town of Harrison, 438 F. 2d 293 (2d Cir., 1971), there was a purposeful dangerous act not done on the spur of the moment. In Myers, the police pursued one Smith over a long distance, the two cars occasionally reaching speeds up to 100 miles per hour, over narrow, winding and wet roads. Other police, on their own initiative, positioned another vehicle across the road at the foot of a steep hill, in such a position that the speeding car coming over the hill would not have seen the police car in time to stop. Of the same nature as Myers is Jansen v. State of New York, 60 Misc 2d 36 (Ct. C., 1968) affd. 32 AD 2d 889 (4th Dept., 1969), also involving a long chase,

there are over 30 miles, where the finding of negligence was, as the court emphasized, not grounded on any emergency response but rather upon a dangerous "plan that ripened after the police had sufficient opportunity for reflection." A different result obtained in Dunn v. State of New York, 34 AD 2d 267, 269 (3d Dept., 1970), where, among other things, only about 60 seconds had elapsed from the beginning of the pursuit to the collision.

Liability was imposed in Thain v. City of New York, 35 AD 2d 545, 546 (2d Dept., 1970) affd 30 NY 2d 524 (1972), where the police chased a traffic violator off the Belt Parkway, then onto the Fort Hamilton Parkway, allegedly without sounding their siren, and then continued at speeds up to 60 m.p.h., pushing the fleeing vehicle into running through 16 red lights, all long after it had become obvious that the fleeing car was not going to slow down. Liability was similarly imposed on the City in Alexander v. City of New York, 53 AD 2d 846 (1st Dept. 1976), where the court's opinion cites Thain, but gives no facts. The Record in Alexander also indicates a long chase, also allegedly without a siren, starting at St. Nicholas Avenue and 124th Street, involving turns onto 125th Street, then onto Seventh Avenue, then onto 126th Street, then going for a block on the wrong side of the street, and then all the way north to 138th Street

(Alexander Rec. on App., pp. 528-530), where it was obvious, after such duration, that the chase should have been broken off or else the siren used.

Here, while plaintiff's main "theory" of negligence seems to be that the police acted improperly in undertaking a "chase" in the face of a minor traffic violation (ignoring the testimony of the attempted homicide), various other claims of unreasonable conduct are suggested by plaintiff's witnesses. We believe the best way to respond to this shot-gun attack is to review the acts of the car thief and the response of the police in the order that these occurred in light of the above cases.

There is no reason to reject the undisputed testimony of an attempted homicide here. Such criminal action by the brief is entirely consistent with the undisputed fact that the driver of the Thunderbird was a criminal, having only just stolen the car and, as indicated by his subsequent actions, was desperate to avoid arrest. But whether or not we accept the testimony of an attempted homicice (at 83rd Street) we must start prior to that time, to wit, when the police first saw the Thunderbird. Undisputedly, as plaintiff's counsel stresses and the police admit, there was then no reason to believe that the car had been stolen. There is no reason however to reject the police testimony that the driver of the Thunderbird was guilty of a traffic infraction (passing a red light) albeit, as the police also admit,

this was not a particularly dangerous act under the circumstances. But there must have been at least a traffic violation for it would be difficult, if not impossible, to assume that everything that occurred thereafter had no generating cause at all*.

The traffic violation (passing a red light) was, by itself, enough to impose a duty on the police (they were on traffic duty) to take action. Thain v. City of New York, supra. This duty the police performed without exceeding the speed limit, but, in any event, without incident, until both cars stopped. There is some testimony that at this point the police should have pulled up ahead of the violator, to "block off" his path, and plaintiff's witness Neary also criticized Officer Jaques for placing himself in a vulnerable position, on foot, in front of the violator. None of those acts are any basis for imposing liability here.

The Thunderbird was stopped behind a stopped car. At best, the police car might have come alongside, and then both cars together, side-by-side, would have blocked all traffic along 83rd Street behind them. If the driver of the Thunderbird were intent on taking off as soon as able to do so, the police could not have

*It is easy to understand why the driver-thief of the Thunderbird did what he did. He would not have thought it adviseable to remain stopped on the very same street where the owner of the Thunderbird had parked, and where the thief, if stopped, might have been observed by the owner.

stopped him from alongside, short of using deadly force; so it was just as well that they stopped behind him.

Even if the police could have blocked off the violator, still, as plaintiff's counsel stresses throughout, there was no reason for the police to suspect that the Thunderbird had been stolen. In Stanton, supra, where a claim was similarly made that the police had failed to take a traffic violator into custody after he had stopped, the Appellate Division (affirmed by the Court of Appeals) rejected such claim, noting that there is nothing in a traffic violation to suggest that the violator, once stopped, would not thereafter comply with the officer's order (29 AD 2d at pp. 612-613).

Up to this point, the police had done nothing except what they were required and under a duty to do. However, unknown to them, they had stumbled upon a thief. Also in the car was a "snapper," a tool used to open locked cars. The driver-thief obviously anticipated being asked for the automobile registration. Thus, all for reasons unknown to the police, just as soon as the car ahead moved, the Thunderbird shot forward, the criminal not deterred even by an officer in his path, and having committed this additional and serious crime, fled desperately. At the corner, the thief turned south in an effort to leave the police far behind.

Having just fled the scene at desperate speed the thief was not about to stop at a red light one short block away, or anywhere else in the immediate vicinity and in the view of the police, intending, as he obviously did, to "lose" the police.

No doubt the acts of the police up to that time, their stumbling upon a thief, did induce this desperate dash. But the police actions, from the time the Thunderbird was observed passing a red light until it stopped, are beyond any condemnation even if, as is suggested by plaintiff's counsel, the original traffic violation had not been a dangerous act. Up to the time the Thunderbird "took off" from 83rd Street, the police had done nothing that was not their duty under New York Law. Thereafter, what the police did was a reaction to, and not the generating cause of, the thief's desperate actions.

The police, with no time for reflection, followed, keeping the lawbreaker in view. They either lost ground or, at most, maintained a fixed distance between the two cars. It is suggested that perhaps they drove too fast, pushing the thief to greater speed and recklessness. Besides this being a second-guessing of the police officers' judgment (on the flimsiest evidence of speed) there is no basis for concluding, except by pure speculation, that the police reaction caused the violator to act as he did. The thief, without a regis-

tration and with the tool of his criminal trade in the car (even if we do not accept the evidence of the attempted homicide) was determined to escape and not merely to remain a fixed distance ahead till, as the police hoped, forced to slow in congested traffic. At least as likely is it that if the thief managed to be momentarily out of sight, he would have drastically increased his speed, to "lose" the police once and for all, as in Strobel v. State of New York, 36 AD 2d 485 (3d Dept., 1971).

Plaintiff's hired expert witnesses, Neary and Fallak, did not fault the police for their initial decision to pursue; the most that Neary could say to aid plaintiff's case was that the police should have given "consideration to discontinuing the chase" (153). The thief travelled, in all, only 3 short blocks; the police, a block or more behind, only two blocks. Just where between 83rd Street and 81st Street (in those few seconds) should the police have "discontinued"? And what basis is there for speculating that the desperate thief, racing out ahead at about one block every two to three seconds, would have reacted instantly to a police slow down behind him, i.e., at some point between 81st and 80th Streets?

Officer Jaques and Officer Gallagher both acknowledged that they probably would not have overtaken the thief on speed alone, hoping that he might slow, and they considered soon breaking off pursuit. That decision never had to be made here, the police had travelled, in all, slightly more than two blocks.

We now discuss the siren. There is testimony by the occupants in plaintiff's car (other than those who do not remember) that they heard nothing until the collision. That evidence leaves much to be desired (as we discuss in Point II). But, in arguing for a directed verdict on the law, we shall assume arguendo that a jury could find that the police were not sounding their siren. Such a finding, nevertheless, may not be a basis for imposing liability on the facts and evidence of this particular case.

Since the police maintain that they were sounding their siren, it is obvious that this was, in their view, a proper course, but not necessarily that it was the only proper course. Much could be said in favor of sounding the siren. It may alert persons in the vicinity, but only if the police car is close behind the violator and bystanders are attentive. Also it is safer for the police themselves if they are proceeding in excess of the normal speed limit or attempting to get other cars to yield the

right of way; and this course has been held consistent with reasonable care. See, e.g., Dunn v. State of New York, 34 AD 2d 267 (3d Dept., 1970); Strobel v. State 36 AD 2d 485, 487 (3rd Dept., 1971).

However, much can be said also for an alternate course of action under the circumstances of this particular case. Plaintiff (apparently assuming there was a siren sounding) presented a retired police inspector to give the expert opinion that the better procedure would have been to follow without sounding the siren; that a sounding siren would have caused the lawbreaker to act even more recklessly, and would have been, in the witness' words, "like waving a red flag in front of a bull." There is much logic in such a view also. Without the benefit of hindsight it would be rational to assume, at least from the outset, that the traffic violator would not be reckless for his own safety. An accident might cause him a severe and painful injury, and would result in his capture, if not death. Until the violator's flight had proceeded for some distance, the police could not know. By sounding the siren from the outset the police might have been urging him to be more reckless than otherwise. Though the Thunderbird was, from all accounts, going at 70 m.p.h., it was still reasonable to assume the traffic violator might soon slow down; and sounding the siren might have encouraged him to maintain his initial speed longer than otherwise,

or even to increase it, as he was capable of doing. In sum, there are very good reasons for the police not to sound their siren, reasons presented here by a plaintiff's witness, and very good reasons also for sounding it. In this respect cases like Thain and Alexander (discussed above) are distinguishable. In Thain, after a chase had gone on for several miles, with the lawbreaker passing 16 red lights, it had long since become clear that a siren would not have alarmed the lawbreaker. Here, however, no matter what the police did, one could always say after an accident, with the benefit of hindsight, that one course would here have been better. But that not the same as saying that in the initial stages of pursuit that either alternative would have been improper.

When plaintiff's counsel, in summation, urged that there was no danger to the public until the police reacted, he had to have been referring to the initial traffic violation only. Once the police had stumbled upon a criminal, there was, suddenly, unexpectedly, and most assureedly, a highly dangerous situation, and quite apart from the attempted homicide, a situation which the police were not privileged (and certainly not compelled) to ignore. They had not the time to deliberate (e.g., to do research as done here by plaintiff's witness, Neary). Whatever their reaction, it would have had no appreciable effect during that brief initial stage

of the criminal's desperate flight (when the accident occurred), but also, whatever they did could with some logic and more than a little hindsight be second-guessed. Here the police precipitated a situation only by the enforcement of the law and thereafter reacted to the dangerous situation thereby created. To allow liability to be imposed on the municipality for the criminal's acts would mean that police attempting to issue a traffic summons but, by chance, coming up against a criminal, must either immediately back off or become the insurers of the reckless conduct of that criminal, all contrary to the law of New York. cf. Stanton v. State of New York, 26 NY 2d 990 (1970).

POINT II

ASSUMING THAT THE CITY COULD BE LIABLE FOR NEGLIGENCE IN THE MANNER OF THE PURSUIT, NEVERTHELESS THERE COULD BE NO LIABILITY UNDER NEW YORK LAW MERELY FOR THE POLICE UNDERTAKING PURSUIT, WHICH THE POLICE WERE UNDER A DUTY TO DO (THAIN V. CITY OF NEW YORK, 30 NY 2d 524); AND A CHARGE TO THAT EFFECT, AS REQUESTED HERE, SHOULD HAVE BEEN GIVEN.

The implication of the testimony of those of plaintiff's witnesses who had any recollection of the accident, that they heard nothing prior to the collision, is that the police were not sounding their siren. Assuming arguendo that such fact could be a basis for imposing liability here under Thain v. City of New York, 35 AD 2d 545, 546 (2d Dept., 1970) affd. 30 NY 2d 524 (1972), nevertheless such a theory of liability was not strongly urged upon the jury for the good reason that it was based on very weak testimony.

First, as could be expected in December, it was cold, and the windows of the Bliss car, except perhaps one on the far side that was very slightly open, were all closed. The ten people, who had been together all evening, were "talking and laughing," according to Mrs. Rose Gregorio (44), again, as might be expected. The estimates as to the distance between the Thunderbird and the police car vary, understandably so considering that everything happened in seconds, but there is the observable physical fact that the police car did not go into the intersection of

80th Street, strongly suggesting that the police were either not going very fast or, more probably, that they were at least a block or perhaps more away from 80th Street just before the accident (as Bliss and Gallagher testified). Only two or three seconds before that, if the police were going at 50 m.p.h. (or at about 75 feet per second), they would have been back at 82nd Street. With plaintiff's witnesses not paying attention, but talking and laughing inside a closed car, it is easily possible that the siren was on but that, during a very brief interval, these witnesses just did not hear it.

Against this is the testimony of the two police officers. While the police are "interested" witnesses here, so too are all of the occupants of the Bliss vehicle, all parties to litigation arising out of this accident.* But the police testimony is highly probable. If they were flashing their red light, as Bliss acknowledges, and had passed (two) red traffic lights, is it not likely, for no other reason than their own safety, that they would also have been sounding their siren as well. Furthermore they did not have to falsify their evidence to protect their reputations. Were they not sounding their siren, they could have

*The Court correctly charged that plaintiff and defendant Bliss were "interested" witnesses as were all of the patrolmen who testified here (190). While no exception was taken, it was wrong to exclude the occupants of the Bliss car from this characterization since they are all plaintiffs in the state courts in actions arising out of this same accident.

sought to extenuate their actions by stating that they did not wish to alarm the violator into more reckless action (as per Fallek's opinion testimony). Were they fabricating, they were risking contradiction by witnesses in the street, who would have been questioned during investigation that was sure to follow at the scene. Yet the police maintained, from the outset, that they were sounding their siren. The occupants of the Bliss vehicle, on the other hand, were not risking contradiction. Their testimony was only that they did not remember or did not hear any siren, which cannot be contradicted since it is entirely understandable in a closed vehicle. This is illustrated here by Bliss: he alone saw the police flasher off in the distance and while he testified that he heard nothing he immediately qualified his answer by volunteering to say that the windows of his car were closed (4).

We would not make these observations if there were merely a conflict between the police and the occupants of the closed car. But there is a totally disinterested witness, Ferder, who came forward voluntarily. He was in an excellent position to hear the siren while standing at 82nd Street and Lexington Avenue; and he witnessed the accident after his attention had been attracted by the sound of the siren.

Since the issue here is not whether any particular individual or individuals heard the siren (during a short interval) but whether it in fact sounded, the affir-

mative evidence of a disinterested and credible witness is entitled to far greater weight than is negative evidence of witnesses who say only that they heard (and saw) nothing, if the circumstances are such, as here, that a sounding siren might well not have been heard by them. Indeed, depending on on the circumstances, the affirmative evidence, if disinterested, might be entitled to conclusive effect, as for example, in Culhane v. New York Cential and Hudson River R. Co., 60 N.Y. 133 (1875). There two witnesses for plaintiff testified they did not hear a warning bell and two witnesses for defendant (in addition to the person who said he rang it) testified that they did. The Court wrote (Id at p. 137):

> "As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will to some extent prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." (emphasis added)

That logic was quoted and applied in Foley v. New York Central and Hudson River R. Co., 197 N.Y. 430, 434 (1910). To the same effect, see also Gaglio v. City of New York, 143 F. 2d 904, 907 (2d Cir., 1944); Cmuk v. Lehigh

Valley R. Co., 116 F. 2d 569 (2d Cir., 1941).

The above observations show why plaintiff's attorney virtually abandoned the no-siren argument when he called Fallek, a retired inspector, to give the opinion that using the siren was dangerous (106-107). Plaintiff's counsel questioned the police officers as to such matters as the capabilities of the two vehicles and as the criteria that they used in making their (split-second) decision to undertake pursuit, and then, in summation, he made the arguments that the police could not have overtaken the Thunderbird on speed alone, that there was no danger if the lawbreaker were not pursued, that the police didn't know that the Thunderbird was stolen, and then even if it were, "it is $3000,...where are your priorities," that there was risk from pursuit, arguing that the "cars on Lexington [were] pulling over to get out of the way" (consistent with the siren sounding); and, finally, that even if the lawbreaker had tried to run down a police officer, still they had his license number and therefore didn't have to pursue (See summation, pp 440-441). In short, his "theory," as pressed on the jury, was that it was negligent for the police to have undertaken pursuit, either in response to the original traffic violation or from 83rd Street. With a jury in natural sympathy with the innocent victions of a criminal act, any arguments might well have appeal (see Stanton v. State of New York, 26 NY 2d 990, 992 [1970]), it was necessary to limit plaintiff to a "theory"

of liability cognizable under New York law. This the trial court did not do, giving instead a very general instruction to measure "the defendant's conduct against the standards that you believe would have been reasonable" (199). But that principal argument made by plaintiff's counsel, that pursuit should not have been undertaken, is a theory of liability distinctly contrary to the well established law of New York.

We have indicated supra, in our argument for judgment on the law (Point I), the New York courts have steadfastly maintained that a municipality "is not to be held liable for the act of its police officers in undertaking a pursuit of a traffic violator," specifically because the police have a duty to enforce the law, and this includes "a duty to undertake pursuit". This language is from Thain v. City of New York, 35 AD 2d 545, 546 (2d Dept., 1970) affd 30 NY 2d 524 (1972), a case where liability was imposed but solely on the basis of negligence in the manner of the pursuit, where the court was careful to reject, on the law, any claim based on the mere fact that pursuit was undertaken, citing the lengthy discussion and holding in Stanton v. State of New York, 29 AD 2d 612, 613-614 (3d Dept., 1967) affirmed "for the reasons stated in the majority opinion at the Appellate Division" in 26 NY 2d 990 (1970). See also Dunn v. State of New York, 34 AD 2d 267, 268-269 (3d Dept., 1970).

Perhaps, as plaintiff's witness Neary suggested,

the police should, after a while, have re-evaluated the wisdom of continuing an extended pursuit. But there can be no second-guessing the split-second initial decision, even though, as with any pursuit, it must necessarily increase somewhat the risk of an accident. In Wrubel v. State of New York, 11 Misc 2d 878 (Ct. Cl., 1958), an opinion cited with approval and adopted in Stanton, the court described as "novel," and rejected, any attempt to predicate liability on the fact that the trooper "did by his attempt alone increase the danger himself." If that be the law, said the court, "an operator who is speeding, or who is a reckless driver on the highway, would know that all he had to do was to go faster - and under claimants' theory escape would be possible-there would be no chase" (11 Misc 2d at p. 880).

Thus, as a matter of New York law, not to be varied by testimony of witnesses, the principal arguments of plaintiff's counsel are no basis for liability. To avoid the effect of these arguments, the City requested a charge as to the above principles of New York law, taken verbatim from Thain v. City of New York, 35 AD 2d 545, 546 (2d Dept. 1970) affd 30 NY 2d 524 (1972), to wit, that the municipality was not to be liable for the police "undertaking a pursuit of a traffic violator" because it was their duty to do so, and also that no liability is to attach if the police use "their best judgment...even though hindsight might disclose alternate methods that might have been safer for the public bystanders". Such a charge was made necessary here by the

arguments of plaintiff's counsel, and the omission to so charge was here rendered prejudical because the charge, as given, set forth plaintiff's claim only in the most general terms, i.e., that the police had acted "unreasonably" under the circumstances, without attempting to limit plaintiff's claim to the manner, as distinct from the fact, of pursuit. In effect the jury were invited to second guess the police, to use their own "general knowledge" and to base their verdict on what they regarded as "reasonable", in effect to return a verdict upon any theory at all, whether consistent with New York law or not.*

Thus, from the general jury's finding of "negligence" against the City it is impossible to know whether they relied on the almost abandoned-claim of no-siren or, as is at least as likely, upon those of plaintiff's arguments most emphatically made, but legally untenable, that the police should not have undertaken pursuit at all. If that is no basis for liability under the law of New York, and if the complaint is not dismissed on the law, there should be a new trial with a correct instruction. cf. United States v. Hutchins, 268 F 2d 69, 72 (6th Cir., 1959)

*In Myers v. Town of Harrison, 438 F. 2d 293 (2d Cir., 1971), this court acknowledged (on p. 296), that the Appellate Division in Stanton (affirmed for the reasons there stated by the New York Court of Appeals) has "made it clear that the normal standards of negligence do not apply to a law enforement officer operating under [Vehicle and Traffic Law] section 1104," that being the section which permits police to exceed otherwise applicable speed limits and traffic signs. (emphasis added)

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND JUDGMENT DIRECTED IN FAVOR OF APPELLANT, OR, IN THE ALTERNATIVE, THERE SHOULD BE A NEW TRIAL WITH A PROPER INSTRUCTION.

Respectfully submitted,
W. BERNARD RICHLAND
Corporation Counsel of the
City of New York,
Attorney for Appellant

L. KEVIN SHERIDAN,
BERNARD BURSTEIN,
JAMES M. CARROLL,
Of Counsel

DUE AND TIMELY SERVICE OF 3 COPIES OF THE
WITHIN Brief , IS HEREBY ADMITTED
THIS 30th DAY OF June , 1977

Harry H Lipsey
Attorney for Plt.-Resp